

THE CREDITOR'S BILL

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Since 1936 there has been a comparative flurry in the digests under the title of "Creditors' Bills," as a number of lawyers have dug an old remedy out of the cases around 1900 and from 1865 on back. After credit has been expanded for a period and conditions grow tighter, difficult cases of collection appear in greater numbers, and a means for reaching even the more elusive assets is seriously needed. Some of the wild credit and speculation features of early Ohio history, produced the remedy's early popularity. The great expansion of credit in our present economy suggests the need for an implement to use in the tough cases. Some of the cases suggest also the value of a remedy flexible enough to intercept the windfalls which occasionally come even to debtors. That the remedy proceeds by action, an independent suit, suggests a reasonable job of legal work will be involved, an opportunity to use professional tools which have been pleasing to the hands of masters in the past, as well as an appropriate fee.

Whatever might be desirable as to the contents of this essay, it seems expedient to undertake only a simple statement of the basic features of the remedy, with a few tentative arguments on some points of doubt. The ramifications are endless and seldom seem simple enough to compact into a citation. But the greater difficulty is to come at a clear picture of the chief features of the remedy. If that could be sketched, apparently many of the special problems could be looked up one by one as the special circumstances of one case or another presents them.

GENERAL CHARACTERISTICS OF THE CREDITOR'S BILL

The creditor's bill is a resort to equitable powers to subject some kinds of assets, or assets under some conditions, to the satisfaction of a judgment.¹ It is not one clear-cut remedy, such as a judgment for debt or a decree of specific performance. It opens the arsenal door, and the creditor can pick a poinard or a field piece.

The holder of a claim which can be reduced to a judgment for damages first establishes that claim by securing a judgment. If sufficient property of the debtor can be found which can be reached by execution, the judgment creditor can elect to resort to attachment, proceedings in aid, or a creditor's bill. When attachment or proceedings in aid would not reach particular assets for any reason, particularly when the debtor's claim is not "matured" or when there are conflicting claims to those assets, liens intervening or numerous creditors maneuvering for advantage, the creditor's bill may be advantageous or essential.

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¹ The simple creditor's bill only will be dealt with, in which the creditor seeks to get satisfaction of his own judgment claim. Class suits, with all their elaborations, are omitted, as are various special situations where a prior judgment may not be necessary.

When a bill is deemed appropriate, a petition meeting the usual standards of equity pleading is filed. This bill shows the inadequacy of legal relief, describing if possible the particular assets sought to be reached, and the positions of all persons made parties. It makes parties the judgment debtor and all persons holding any interests in or claims to the assets, or who will be affected by the relief asked. The prayer will in effect ask for any type of equitable decree, whether *in rem* or *in personam* in operation, which will procure the application of the assets to the satisfaction of plaintiff's judgment. A venue will be picked which will as to the judgment debtor or some party holding assets of the debtor, meet the requirements for a personal action. When a choice remains after meeting that requirement, the venue will be picked which includes important assets upon which a decree can operate *in rem*, by sale, distribution of funds in the custody of the court, or otherwise. Summons will be issued to all parties who can be served in that county or any county of the state, and where appropriate, service will be made by publication or otherwise on parties outside the state.

Upon service of summons on the judgment debtor or other holder of assets of the debtor, the plaintiff in the creditor's bill acquires a lien (if he has not already a judgment lien) on the property "held" by that defendant. So far as concerns priority of claim to those assets to satisfy judgments, the creditor's bill lien will be given the same standing by the equity court as a judgment lien. As against all parties holding judgment or other liens on the specific assets, the creditor's bill lien will rank according to the date of service of summons. Acquiring such a security for collection is obviously one of the important objectives of the creditor's bill.

At the pleading stage, the usual incidents of a complex equitable suit may be expected, including any form of discovery as against any defendant, amendments to the petition to describe any property discovered, answers setting up claims of title or other interest, and cross-petitions claiming a wide variety of relief. Interpleader and intervention to the full scope of equitable principles, not merely such as is provided under the code, will occur from time to time. Interlocutory injunctions and the appointment of a receiver, as well as directions to deliver assets to the clerk or other officer of the court are usual, not only to preserve the assets but also to pave the way whenever possible for a decree which will effectively control distribution of the assets.

The relief to be granted, whether intermediate or final, seems to include a large segment of the forms which an equity court may make available, including a marshalling of assets or liens, and all manner of judgments *in personam* or *in rem* which may be needful to control the application of assets to debts. Neither a divorce of the debtor from his wife nor custody of the debtor's children will be adjudicated, but it is difficult to think of other types of equity jurisdiction which could not in one case or another become involved. The arsenal door is indeed ajar, once the suit is begun.

THE BASIS OF, AND STATUTES RELATING TO, CREDITORS' BILLS

Ohio courts have found no serious problems in connection with the statutes dealing with creditors' bills, and the legislative history is quite simple.

While the General Assembly in 1831 was engaged in overhauling the law of numerous areas, it adopted separate general acts relating to practice in courts of law and in chancery. Section sixteen of the Chancery Practice Act of March 14, 1831,² contained the substance of the present provision, and a little that is now omitted.³ Section sixteen was a painstaking and successful effort to cover the major features of the creditor's bill as it had developed in chancery practice, if one is to judge by the apparent ease with which the courts have lived with its provisions, and the lack of subsequent legislative change.

The Code of Civil Procedure of March 11, 1853, contained the earlier provision in a more simply worded form⁴ which has been changed

² 29 OHIO LAWS 84:

§16. In all cases where judgments at law, or decrees in chancery, have been obtained, and rendered against any person, and the debtor has not personal or real estate, subject to levy on execution, sufficient to satisfy said judgment or decree; but has any equitable interests in real estate, as mortgagor, mortgagee, or otherwise; or any interest, shares, or stock, in any banking, turnpike, bridge, or any other joint stock company; or any judgments or decrees, or any money, contracts, debts, or choses in action, due to him, or which may become due; or moneys, goods, and effects, in the hands or possession of any person, body politic or corporate; the same may be subjected in chancery, to the payment of said judgment or decree, and applications may be made to the courts of chancery, in the county where such judgment or decree was rendered, or where said lands lie, to subject any or all of the herein before enumerated interests, to the payment of the judgment or decree aforesaid, according to the usual course of proceeding, and known usages of courts of chancery, and the said court shall decree sales, and enforce all necessary transfers and conveyances, to vest in any person purchasing, or taking under such decree, all the right, title, and interest, of the said debtor, in the interests sold, or the subject of the decree, at the time of the service of process in such case, to be held in the same manner such debtor held the same: *Provided*, That the sale of all equitable interests in real estate, shall be conducted in all respects, in the same manner as is provided by law, for the sale of real estate, in the "act regulating judgments and executions."

³ The clauses relating to sale and "expressly" giving a lien, *i.e.*, the purchaser to get the title or right held by the judgment debtor at the time of service of process.

⁴ 51 OHIO LAWS 57, 135:

§458. When a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he may have in real estate, as mortgagor, mortgagee, or otherwise, or any interest he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money contracts, claims or choses in action due or to become due to him, or in any judgment or decree; or any money, goods, or effects

very little indeed since.⁵ In the Code of 1853, section 458 was the first section in Title XIV, "Executions", Chapter II, "Proceedings in Aid of Executions." Added to the body of the section which has come down into the present Revised Code, were originally the words "or as in this chapter prescribed."

The courts have recognized the statutory provisions as "declaratory of the common law," so as to find guidance as to the various incidents of the remedy in equity principles as well as in the wording of the statute. No doubt the frequent use of the remedy in the litigious decades prior to 1853,⁶ had firmly impressed that assumption on the minds of the judges who were to unravel the remedial results of the "fusion" of law and equity under the code. In 1855, the supreme court decided a case begun prior to the effective date of the code, involving questions under §15 (injunctions staying transfers pending a suit at law) and §16 of the Chancery Act of 1831.⁷ Speaking through Thurman, C. J., the court noted that §16:

gave a lien by the express terms of that section; and even without an express provision to that effect, a lien would thereby have been created, probably, by the known rules and usages of equity. . . . A bill to reach property not liable to legal process, and subject it to the payment of a judgment, is now a well known equitable remedy, however much it may once have been questioned, but not so a bill to enjoin a disposition of effects until a judgment can be obtained. The former needs no statute to support it; *Bayard v. Hoffman*, 4 Johns. Ch. 450; but the latter is the mere creature of the statute.⁸

As was to be expected, a few years later when the court dealt with a creditor's bill brought under the code, the opinion after noticing that section 458 of the code was substantially the same as section 16 of the act of 1831, continued:⁹

Under our present statute, therefore, it may be reasonably inferred that the legislature intended to continue rather than change the former practice of the courts, in extending equitable relief to the judgment creditor, in the cases mentioned, when unable to collect his judgment by execution and levy.

Perhaps it will not be an excess of caution to mention one other statute which might be useful in extending creditors' bills beyond local precedents, if that were ever needful, that is, §603 of the 1853 Code of

which he may have in the possession of any person, body politic or corporate, shall be subject to the payment of such judgment, by action, or as in this chapter prescribed.

⁵ OHIO REV. CODE §2333.01 (11760).

⁶ See, for example, *Miers v. Zanesville and Maysville Turnpike Co.*, 11 Ohio 273 (1842) upholding the discovery portions of a creditor's bill.

⁷ *Bowry v. Odell*, 4 Ohio St. 623 (1855).

⁸ *Id.* 625-626.

⁹ *Butler v. Birkey*, 13 Ohio St. 514, 518 (1862). Cf. *American Ins. Union v. Read*, 24 Ohio App. 192, 194 (1927).

Civil Procedure.¹⁰ Perhaps the position of this provision in a chapter, "Provisions as to the Operation of The Code", may explain its disappearance from the revised codes, reportedly during the 1880's. The Ohio Supreme Court in 1900, however, found this provision a substantial ground in a creditor's bill case, for sustaining equitable interpleader. Noting that defendant's attempt to interplead another claimant did not fall within the code provision, which stood as enacted in 1853, the court said:¹¹

Section 603 of the same act has this provision: "If a case ever arise, in which an action for the enforcement and protection of a right, or the redress or prevention of a wrong, can not be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice." This language would seem to be broad enough to cover the case in hand. But, aside from this, the matter of interpleader is of equitable cognizance.

The conclusion is clear that both the early legislation on this topic, and the Code of Civil Procedure with its sweeping changes in procedure, including the duplication of many features of the creditor's bill in the new proceedings in aid, preserved this equitable proceedings without making basic changes in its character or use.

THE SIGNIFICANCE OF THE REMEDY AT LAW OF PROCEEDINGS IN AID

The innovation in the Code of Civil Procedure, of providing at law a summary proceedings in aid of execution, has been interpreted in some jurisdictions as requiring that the possibilities of relief at law by these means must be exhausted by the judgment creditor before he can resort to equity with his creditor's bill.¹² Certainly the duplication in the sections on proceedings in aid, of many distinctive features of the old creditor's bill, including discovery, receivers, and orders of application, could be understood as an extension of jurisdiction at law accompanied by an implied corresponding restriction on equity jurisdiction.

Probably the general arrangement and wording of the code provisions,¹³ as well as attachment to and respect for the merits of long-used procedures, helped the Ohio courts take an attitude which seems entirely consistent with the general purpose of the code authors, which was to free the courts from many arbitrary and awkward distinctions of form and remedy, and thus to make justice more freely and expeditiously available. The creditor's bill section in the code was the first section in the chapter on "Proceedings in Aid of Execution," and as was noted, ended in 1853 with the words, "by action, or as in this chapter pre-

¹⁰ 51 Ohio Laws 57, 161.

¹¹ First National Bank v. Beebe, 60 Ohio St. 41, 43-44, 53 N. E. 493, 494-5 (1900).

¹² 21 C. J. S., CREDITORS' SUITS 1061, n. 29, 30, 35; p. 1062, n. 37; 15 C. J., CREDITORS' SUITS 1385, n. 31, p. 1385, n. 37.

¹³ *Supra*, n. 4.

scribed."¹⁴ The arrangement and words point to an intention to set up a unified system of remedies, with as few barriers as possible to the free selection by the judgment creditor of the remedy which he judges will best serve his interests and best fit the precise situation that confronts him. That freedom of choice would be eliminated by a requirement that proceedings in aid at law be first resorted to and demonstrated to be inadequate, before a creditor's bill could be filed.

In an early case¹⁵ seeking review of an order in a proceedings in aid, the supreme court found itself in no position to deal with complex relations involving third parties. The court's analysis of the situation developed a concept of the relative functions of a proceedings in equity by action, and summary proceedings at law. The court found insuperable difficulties in any attempt to settle the issues argued because of the lack of parties and the limited scope of the inquiry below. The court said:

The question, under section 464 of the code, whether the person summoned has property of, or is indebted to, the judgment debtor, appears to be regarded in the first instance as a mere *ex parte* preliminary inquiry. It is not properly a litigation. It is in the nature of an inquest or proceeding *in rem*. The first step is to ascertain the existence of the property or indebtedness. If it be found—if there be no doubt or dispute as to ownership or right—an appropriation is at once made to the satisfaction of the judgment. If there be doubt—if the judge is not satisfied as to the propriety of an immediate appropriation, and further inquiry is desired—the proceeding should assume the shape of a regular litigation. The proper parties should be brought in, and steps taken to retain the control of the subject matter of the litigation. . . . The party had, in the beginning, his election to proceed by action, or in the summary manner. If the latter can not accomplish his purpose, if he has lost time, or a priority of lien or satisfaction, it is the result of his own choice of remedies, preferring the most speedy to the most sure.¹⁶

Subsequent decisions have pointed out more specifically the distinctions between proceedings in aid and creditors' bills. When in the proceedings the garnishee claims ownership or an interest in the property sought, he is entitled to have that issue tried "in regular form," by a court of equity or other tribunal "clothed with authority to hear and determine as to the rights of the respective parties, and to enforce the decree in the manner usual in such courts."¹⁷ Various decisions have turned upon the fact that garnishees are not parties to the suit or proceedings in which they are summoned.¹⁸ When a judge in a proceedings finds the garnishee "has

¹⁴ *Supra*, *ibid*.

¹⁵ *Welch v. Pittsburgh, Ft. W. & C. R. Co.*, 11 Ohio St. 569 (1860).

¹⁶ *Id.*, 573-574.

¹⁷ *White v. Gates*, 42 Ohio St. 109, 112 (1884).

¹⁸ *E. g.*, *Graver v. Guardian Trust Co.*, 29 Ohio App. 233, 235, 163 N. E.

property" of the judgment defendant and orders it applied to the judgment, such finding is not *res judicata* when the same issue is raised in subsequent litigation.¹⁹ It is stressed repeatedly that the summary proceeding is very simple in character, and that it is only when it appears uncontrovertibly that the garnishee has property of the defendant, that the court has any authority to order its delivery or payment.²⁰

One possible advantage of the proceeding in aid over the creditor's bill may be noted. It was early held in common pleas court that an answer of abundant other property to satisfy the judgment, stated a good defense to a creditor's bill.²¹ A later court of appeals decision held that a motion to vacate an order in a proceedings in aid, on the same ground, was not well founded, that any other conclusion would render the statute ineffective, and that the contrary result in a creditor's bill resulted only from the equitable requirement of the absence of an adequate remedy at law.²²

On the other hand, the courts have found the means for protecting the creditor who resorts first to proceedings in aid and later finds need for more comprehensive jurisdiction of equity. The method of preserving the garnishment lien obtained in the proceedings, by ordering the person having the property to deliver it to a receiver, leaving the receiver to resort to the ordinary remedy by action, was suggested obiter.²³ Later, the Supreme Court of Ohio sustained a creditor's bill brought to enforce the lien in the proceedings in aid after conflicting claims to the property developed.²⁴ Thus, in an action in equity, with all interested persons made parties, a remedy could be provided to protect all interests, including recognition of the priority of the lien obtained in the proceedings in aid.²⁵ This seems very satisfactory protection against the hazards of a choice that turns out to be unfortunate.

As the Ohio courts have interpreted the code, it provides a system of complementary remedies for the aid of a judgment creditor, with the creditor's choice relatively free of mere procedural obstacles. If the assets of the debtor appear to be unencumbered by conflicting claims, proceed-

502, 503 (1928); *McCoy v. Anderson*, 16 Ohio L. Abs. 385 (C. P. 1933); *Simmons Real Est. Co. v. Riestenperg*, 51 Ohio App. 176, 181, 3 N.E. 2d 645, (1935).

¹⁹ *Pontiac Improvement Co. v. Leisy*, 33 Ohio L. R. 7, 23 Ohio L. Abs. 209 (App. 1930); *Shaffer v. Shaffer*, 36 Ohio L. R. 45, 48, 12 Ohio L. Abs. 262 (App. 1931).

²⁰ *E. g.*, *supra*, n. 18.

²¹ *State Bank of Ohio v. Oliver*, 1 Dis. 159, 12 Ohio Dec. Repr. 548 (C. P. 1856); *Lee v. Harkback*, 2 W. L. M. 527, 2 Ohio Dec. Repr. 361 (C. P. 1860).

²² *Stern v. Columbus Mutual Life Ins. Co.*, 39 Ohio App. 498, 177 N. E. 923 (1931).

²³ *White v. Gates*, *supra*, n. 17, at 112; *Union Bank v. Union Bank*, 6 Ohio St. 254, 261-262 (1856); *Edgerton & Wilcox v. Hanna, Garreston & Co.*, 11 Ohio St. 323 (1860).

²⁴ *Ball v. Towle Manufacturing Co.*, 67 Ohio St. 306, 312-313, 65 N. E. 1015, 1017 (1902).

²⁵ *Id.*, 315-316, 65 N. E. 1018; *Conway v. Gooden*, 15 Ohio L. Abs. 397 (App. 1933).

ings at law in summary form will suffice probably, and can be tried. If conflicting claims to the property by the holder of it or by third persons develop, the lien can be preserved and enforced in a creditor's bill action. If conflicting claims are known to exist or procedural limitations will defeat a proceeding in aid, such as that distribution has not yet been ordered in probate, an action can be started promptly without wasting time on a fruitless resort to summary proceedings. Presumably a creditor will not be hurt if his creditor's bill is dismissed because the debtor points out undiscovered assets which can be reached by an execution. The remedies thus available to the judgment creditor make a consistent pattern.

THE LIEN OF THE CREDITOR'S BILL

An important feature of the preferential treatment accorded the judgment creditor's claim under the law of early Ohio was the judgment lien. As commonly stated, the judgment became a lien upon all personal and real property which could be seized by levy of execution, and the date of the first day of the term in which rendered, or the date of entry of the judgment, determined the judgment creditor's priority of claim to the use of the property to the satisfaction of his judgment. The limitations, however, of the common-law writ of execution, particularly in that it failed to reach equitable interests in either real or personal property, and chases in action, were frequently given as the ground for the development of the creditor's bill.²⁶ Except for a period marked by two amendments to the judgment lien provision of the statutes, the courts of Ohio have held that no judgment lien attaches to property not reachable by execution.²⁷

To integrate the equitable remedy into the judgment lien system by giving the plaintiff in the creditor's bill equivalent and harmonious priorities as to such equitable and intangible interests, courts of equity developed a "lien" obtained through the creditor's bill. Since in many such situations, numerous creditors are joining the race to seize security for payment, justice and equity would demand equivalence in rank and similarity of characteristics for the "equitable lien" with those of the common-law or statutory judgment lien. Considering that the plaintiff already held a judgment which was not a lien on the property sought to be reached by the bill, and the absence of a statutory rule and system for fixing the date of the equitable lien, another rule for fixing that date, but one operating at an earlier period than the decree on the bill, would be required. The earliest of the Ohio cases treated the question as settled, though perhaps not long settled.²⁸

The Chancery Act of 1831 rather carefully spelled out the opera-

²⁶ *E.g.*, *Bowry v. Odell*, 4 Ohio St. 623 (1854).

²⁷ Judgment held a lien: *First Nat'l. Bank v. Logue*, 89 Ohio St. 288 (1914); *Ehlers v. Bell*, 32 Ohio L. R. 630 (Ct. App. 1929); not a lien: *Culp v. Jacobs*, 123 Ohio St. 109, 174 N. E. 242 (1932).

²⁸ *Bowry v. Odell*, *supra*, n. 26; *Douglass v. Huston*, 6 Ohio 156 (1833).

tion of the lien, without calling it such.²⁹ Soon afterwards, the court was presented with the question of fitting such liens into the various priorities of a considerable line of judgment liens.³⁰ The court treated the creditor's bills liens as arising at the commencement of each such suit, and each such lien as being entitled to be fitted in among the judgment lien priorities as of its effective date. The court found in that case that a series of purchases of equitable and legal interests prior to the time of filing the creditor's bill (such interests not being subject to the lien of judgments at law) created in a defendant who finally held such interests equities which were "elder than the attaching of his [plaintiff's] equity, which commenced with the filing of his bill in 1831. It is well settled that in such cases as this, the earliest equity must be preferred."³¹

Another early leading case, *Miers v. Zanesville and Maysville Turnpike Co.*,³² involved the claims of a number of judgment creditors who had resorted to creditor's bills. The debtor defendant prayed that an account be taken of the creditors of the company and the amount realized distributed equally among all. The court refused to order an equal distribution, "for the vigilant creditor, pursuing his claim, acquires a preferable equity, which attaches and becomes a specific lien."³³ The receiver was ordered to pay the assets to judgment creditors in the order in which their liens attached at the filing of their bills.

Soon other decisions, where circumstances required it, fixed more correctly on the time at which the lien attached, that is, the time after the filing of the creditor's bill, when process was served on the person holding the property or money due the debtor.³⁴ The courts continued in later cases to approve the principle that the diligent creditor should be rewarded therefor by a priority of claim,³⁵ and from time to time to call it a "specific lien" as expressing that result.³⁶

The question as to what other effects the creditor's bill lien might have other than to create a priority in distribution of assets, seems not to have arisen except in a few connections. The obvious reasons would be that being an equitable proceeding with not only the judgment debtor a party, but also the holder or holders of his property or debts due him, either the property is constructively or expressly brought within the court's

²⁹ *Supra*, n. 2, later clauses of section as quoted.

³⁰ *Douglass v. Huston*, *supra*, n. 28.

³¹ 6 Ohio 156, 163.

³² 13 Ohio 197 (1844).

³³ *Id.*, p. 198.

³⁴ *Shaw v. Foley*, 62 Ohio St. 30, 56 N. E. 475 (1900); *Bowry v. Odell*, 4 Ohio St. 623 (1855); *accord Citizens Savings & Tr. Co. v. Palmer*, 23 Ohio Cir. Ct. (N. S.) 349 (1915).

³⁵ *Dunbar v. Harrison*, 18 Ohio St. 24 (1868); *Moore v. Rittenhouse* 15 Ohio St. 310 (1864); *Shaw v. Foley*, 62 Ohio St. 30, 56 N. E. 475 (1900).

³⁶ *E.g.*, *Dunbar v. Harrison*, 18 Ohio St. 24 (1868), *Moore v. Rittenhouse*, 15 Ohio St. 310, 316 (1864). For a discussion of specific and general liens, see *Myers v. Hewitt*, 16 Ohio 449 (1847).

control so that transfers are prevented or *lis pendens* would apply. The seizure of less tangible assets, however, such as money due the debtor or of corporate stock, has developed two types of problems. Where the debtor's debtor disregarded an injunction, or at least a prayer for an injunction, against paying the money to debtor's executor, the court concluded that the lien-holder could not be required to follow the fund, but could hold the original debtor therefor.³⁷ The court said the effect was the same as an attachment of the fund in the hands of the debtor's debtor, so the creditor could look to that person for payment. To hold otherwise ". . . would destroy the very purpose and object of a creditor's bill, or even a lien by attachment."³⁸ Professor Vanneman discussed the doubtful effect of preferring the equity of the creditor's bill, obtained by service on the corporation, to that of the purchaser for value and without notice from the holder of a stock certificate.³⁹

It may be noted that the sections providing for proceedings in aid, following the general pattern of duplicating many features of the creditor's bill in the statutory proceedings, in the provision for examination of the debtor of the judgment debtor, provide such a "lien" in words reminiscent of the language of the Chancery Act of 1831.⁴⁰

PROPERTY WHICH MAY BE REACHED

Interests in Land—Legal

The first statutory specification as to property to be reached through a creditor's bill, "any equitable interest which he has in real estate as a mortgagor, mortgagee, or otherwise,"⁴¹ possibly might be found to be an internally consistent statement, i.e., one dealing only with equitable interests. The courts, however, have not felt that the term "equitable interest" need be minutely examined for implied limitations as to the scope of the remedy. The guiding principle seems to have been that the words are to be considered in reference to the inadequacy of processes at law in dealing with various types of interests in real property, and that the creditor's bill may properly reach any type of interest where equity can give a more adequate remedy. The statute appears to encourage such an attitude, since at least in a hasty reading one can come up with the impression that usually the interests of both mortgagor and mortgagee are not primarily equitable.

An excellent opinion in a creditor's bill case in 1847,⁴² obviously written by one thoroughly acquainted with old chancery practice and

³⁷ *Hafer v. Cincinnati*, 49 Ohio St. 60, 30 N. E. 197 (1892) *Citizens Savings & Tr. Co. v. Burkhardt*, 17 N. P. (N. S.) 401 (1914).

³⁸ *Citizens Savings & Tr. Co. v. Burkhardt*, *supra* n. 37, 413; *Alms & Doepke Co. v. Johnson*, 66 Ohio L. Abs. 580, 51 Ohio Op. 375, 115 N.E. 2d 190 (C. P. 1953).

³⁹ Vanneman, *Latent Equities in Ohio*, 5 U. of Cin. L. Rev., 135, 153.

⁴⁰ OHIO REV. CODE §2333.13. (11772).

⁴¹ *Supra*, n. 4.

⁴² *Myers v. Hewitt*, 16 Ohio 449 (1847).

appreciative of the advantages of a full use of equitable remedies, laid a solid foundation for an extension of the creditor's bill beyond a literal reading of the statute. A judgment creditor with a lien on real property had not been made party to the foreclosure of a mortgage given subsequent to the judgment. He filed a bill in chancery making the mortgagor and mortgagee, the mortgage-sale purchaser, and all lien claimants parties, and praying that the land be sold for the payment of the judgment or that the proceeds of the sale already had might be thus appropriated. Ordering a decree for the complainant, the Supreme Court of Ohio directed the proceeds in hand be first applied to the satisfaction of the judgment. To meet the contention that complainant had a complete remedy at law through sale of the property, the opinion discussed the general role of equity in providing a better remedy for the judgment lienholder when various circumstances such as the foreclosure sale in the instant proceedings, or a conveyance in fraud of creditors, had cast a cloud on the title and thus interfered with sale under execution. After stressing that the judgment lien is a statutory and legal right, the court said:

. . . yet if other parties should attempt to impede its operation, equity would lend its aid to remove such impediment, and might exert its power to secure its satisfaction in some other mode than subjecting the specific land, if that end could be accomplished, and it was necessary to protect the rights of others.⁴³

A supreme court opinion of 1864, in a case⁴⁴ of very similar circumstances save that the mortgage foreclosure was carried through and in the end the creditors were reaching for rents collected by a receiver, spelled out the basis of equity jurisdiction even more explicitly.

The necessity which required the judgment creditors to ask the intervention of equity in aid of the process of execution which the law allowed, arose not from the fact that their debtor's estate was an equitable one, for he held the legal title, and they each held specific legal liens upon portions or the whole of his real estate; but it arose from the fact, that their debtor's legal title was incumbered by a previous mortgage executed to Baker; which, under our appraisement laws, would interfere with the sale of the premises on execution at law. Each of them had a right to invoke the equity jurisdiction of the court for this purpose. The object in such case would be, not to *acquire* a specific lien, but to render a subsisting legal lien *effective* and *available*. . . .⁴⁵

Similar cases where the supreme court approved equitable relief, whether called creditors' bills⁴⁶ or for "marshaling the liens"⁴⁷ and ordering the

⁴³ *Id.*, 451.

⁴⁴ *Moore v. Rittenhouse*, 15 Ohio St. 310 (1864).

⁴⁵ *Id.*, 315-316.

⁴⁶ *Dempsey v. Bush*, 18 Ohio St., 376, 382 (1868).

⁴⁷ *Lawrence v. Belger*, 31 Ohio St. 175, 182 (1877); *Hemminway v. Davis*, 24 Ohio St. 150, 163 (1873).

premises sold free of incumbrances, have shown the same construction of the statute as being declaratory of or consistent with the broad chancery principles of jurisdiction in this area.

The same principle of providing a better remedy was applied in an action to enforce a judgment lien against a vested remainder interest of the debtor in land.⁴⁸ While indicating that the question of whether an estate in remainder could be sold on execution, "because of a lack of authority to make the necessary appraisement of such an interest," was not settled,⁴⁹ the court did not argue out an indicated belief that such appraisement and sale could be made. The court was content to find that a judgment lien did attach to the remainder, and that the plaintiff had properly brought his action to subject that interest to payment of his judgment. Jurisdiction to provide more favorable conditions of sale seems to have been assumed. The same ground for sustaining equity jurisdiction to subject beneficial interests under a trust in land was used at an earlier date by a lower court.⁵⁰

Another type of legal interest in real property, that of the holder of a lease for drilling for and producing oil, was found not to be subject to execution issued on a judgment against the lessee or licensee.⁵¹ With oil being produced in quantity, numerous creditors sought to reach the interest. The court held the appropriate remedy was a creditor's bill,⁵² apparently the basic characteristic found in an action first called an action for marshaling the various (and numerous) liens.⁵³ The court found this interest of the same character as that of the holder of a license to mine coal and other minerals.

However the dower interest may be classified,⁵⁴ the widow's unassigned right of dower after the death of the husband has been reached by creditor's bill,⁵⁵ and her inchoate right when determined after the sale of the real property by an assignee for creditors was reached by a proceedings in aid, and so would be reachable by a creditor's bill.⁵⁶

An action to set aside a conveyance in fraud of creditors, is a creditor's bill where the obstacle to execution is the appearance of title in the grantee. Since creditors may treat the fraudulent conveyance as void, both at law and in equity, it is the grantor's legal title that is sought to

⁴⁸ *Lawrence v. Belger*, *supra*, n. 47, at 176.

⁴⁹ *Id.*, 179.

⁵⁰ *Sechler v. Brady*, Dayton Reports 332 (Ohio, Supr. Ct. 1869).

⁵¹ *Meridian National Bank v. McConica*, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106 (1894).

⁵² *Id.*, 453.

⁵³ *Id.*, 443.

⁵⁴ *Good v. Crist*, 23 Ohio App. 484, 5 Ohio L. Abs. 178 (1926).

⁵⁵ *Boltz v. Stolz*, 41 Ohio St. 540 (1885).

⁵⁶ *Good v. Crist*, *supra*, n. 54; but not when "mere inchoate dower" since 114 Ohio Laws 337 (1932): *Geiselman v. Wise*, 137 Ohio St. 93, 28 N. E. 2d 199 (1940).

be subjected to debts. As was pointed out early in *Myers v. Hewitt*,⁵⁷ the ground for equitable intervention is the removal of the cloud cast on the legal title by the fraudulent transfer, which may make the sale less advantageous both because bidders may doubt whether they are buying a title⁵⁸ and because subsequent litigation would otherwise often be necessary to secure possession⁵⁹ or a clear title.⁶⁰ In addition, where judicial sale of the land as property of the grantor is sought by another, a cross bill in the nature of a creditor's bill may be useful to enforce the lien acquired by the judgment at law.⁶¹

A more complex situation arose at a time when the separate property of the wife was primarily liable, as between her and the husband, for the satisfaction of judgments recovered in actions brought against them upon causes existing against her at marriage. When the husband was compelled to pay such a judgment, for purchase money due on land transferred by the wife to a son by a previous marriage, the transfer being shortly before marriage to the plaintiff and after agreeing to marry him, he successfully maintained his action to set aside the conveyance as a fraud against his marital rights, and by means of subrogation to the vendor's lien for purchase money to have the land sold to pay the debt. The court intimated that he would have been entitled to have the land sold as a creditor, although it spelled out the subrogation principle carefully.⁶²

Interests in Land—Equitable

The sale of the mortgagor's interest in lands by a creditor's bill may rest on either of two distinct bases. Where the mortgage is legal in form, *i.e.*, "where the condition of defeasance constitutes a part of the deed,"⁶³ the mortgagor retains the legal title and judgments become a lien thereon. As spelled out in early cases, the creditor's bill is needed to provide a method of enforcing that lien because of the limitations of the processes of execution sales, principally appraisement.⁶⁴ So long as the mortgage is not in default and the mortgagor is in possession, it seems hardly correct to say that only the equity of redemption is being subjected, although such an opinion has been expressed.⁶⁵ The solid basis for a creditor's bill is the inadequacy of the legal remedy.

Where the mortgage is in form an absolute conveyance, so that only

⁵⁷ *Myers v. Hewitt*, 16 Ohio 449, 452 (1847).

⁵⁸ *Sockman v. Sockman*, 18 Ohio 362, 366 (1849).

⁵⁹ *Myers v. Hewitt*, *supra*; *McVeigh v. Ritenour*, 40 Ohio St. 107 (1883).

⁶⁰ *Ibid*; *Clark v. Hubbard*, 8 Ohio 382 (1829).

⁶¹ *Ecker v. Switzer*, 17 Ohio App. 90 (1922).

⁶² *Westerman v. Westerman*, 25 Ohio St. 500 (1874).

⁶³ *Baird v. Kirtland*, 8 Ohio 21, 23 (1837); *Loring v. Melendy* 11 Ohio 355, 356-357 (1842).

⁶⁴ *Moore v. Rittenhouse*, 15 Ohio St. 310, 315-316 (1864). *See*: *Baird v. Kirtland*, *supra*, n. 63, at 23-25.

⁶⁵ *Baird v. Kirtland*, *supra*.

an equitable mortgage can be established, the mortgagor's interests are "purely" or chiefly equitable,⁶⁶ and the courts have held that since a judgment does not become a lien on the mortgagor's interest,⁶⁷ the creditor's bill is the proper and necessary means of reaching the interest.⁶⁸

In a creditor's bill to subject the mortgagor's interests in land, other interests of the debtor may be reached, such as his right to an account for rents and profits where the mortgagee has been in possession of the mortgaged premises, after condition broken, with the consent of the mortgagor.⁶⁹

Where the debtor holds title to land which he has contracted to sell to another who has taken possession, made improvements, and perhaps other liens have been imposed, if the purchaser has not completed payments for the land, the vendor-debtor's interest in the land may be reached by a creditor's bill. In *Edwards v. Edwards*⁷⁰ the vendor's interest was classified as the vendor's lien and it was held that the judgment creditor was entitled to the enforcement of that lien, as an essential element of the value of the claim for the payment of the balance of the purchase price.

The interest of the vendee under a contract for the sale of land, another equitable interest, should in many cases be of substantial value. Only a creditor's bill could reach it effectively, but curiously, only one Ohio case of 1827 seems to have involved this type of interest. The ground for refusing relief in that case was too great a variance between the case pleaded and the proof, not that a bill was an inappropriate remedy.⁷¹

Ohio cases have involved equitable interests outside of any standard system of labels, but the advantages of reaching land not encumbered by other judgments and liens are great enough that diligent search for such unusual interests is well rewarded. In a case where the judgment debtor had built houses on the land of another, under an agreement that the other should have pay for his services and his land and the judgment debtor should have the balance, the court found the creditor's bill stated a good cause of action to subject equitable assets, not subject to execution, thus making the builder's contingent interest in the real estate subject to sale.⁷² Since this interest may be dealt with as a lien, it would seem possible to sell the land free of all claims by joining the title holder and any lien claimants.

A case displaying careful study to find an equitable interest in land, both to insure a more adequate recovery and to provide a sale of all

⁶⁶ *Id.*, 24.

⁶⁷ *Ibid.*; *Loring v. Melendy*, *supra*, n. 63.

⁶⁸ *Ibid.*; *Mattocks v. Humphrey*, 17 Ohio 336 (1848). See: *Hegler v. Grove*, 63 Ohio St. 404, 59 N. E. 162 (1900).

⁶⁹ *Anderson v. Lanterman*, 27 Ohio St. 104 (1875).

⁷⁰ 24 Ohio St., 402, 411-412 (1873).

⁷¹ *Waggoner v. Speck*, 3 Ohio 292 (1827).

⁷² *Womack v. Eversman*, 67 Ohio App. 287, 37 N. E. 2d 678 (1941).

interests in the land, is *Terry v. Claypool*.⁷³ The fact that the property was held in the names of both husband and wife, with the husband making payments on the mortgage which both had signed, suggests a rather common situation at present. With a judgment against the husband, a levy was made on his undivided half interest in the land, and returned unsatisfied because of a prior lien, the mortgage. It appeared that the husband had paid off the balance due on the mortgage which still stood unreleased. A creditor's bill was brought, with husband and wife the defendants. In the absence of evidence that either was the principal debtor, the court found the husband was entitled to contribution from his joint debtor to the extent of half of the balance he had paid; was entitled therefore to be subrogated to the mortgagee's lien on the wife's undivided half interest; that unless the wife paid into court the half of that balance, with interest, within ten days, that plaintiff was entitled to the sale of both half interests, the wife's share being sold as a foreclosure of husband's lien.

Circumstances may dictate whether the judgment creditor shall state the interests he seeks to reach as being either a chose in action or an interest in land. In *Vandenbark v. Mattingly*,⁷⁴ the creditor's bill was framed in terms of reaching the debtor's equitable interest in certain notes which had been pledged to secure the creditors of the other debtor. The notes, however, were secured by a mortgage on the land of the other. The pledgee- assignee for benefit of creditors had started foreclosure on the mortgage, so the creditor's bill plaintiff sought merely to reach the balance of the fund from the foreclosure sale after payment of the claims secured by the pledge. If the foreclosure had not been started, the creditor's bill would have been framed to reach also this interest in the land by foreclosure of the mortgage.

Personal Property—Intangible or Non-Possessory Interests

As to chattels in the possession of the debtor, or those in which he has a present right of possession, the process of execution is normally entirely adequate. As to many of the simple intangible rights, summary processes of attachment or proceedings in aid are not only adequate but are also normally used.⁷⁵ Only when conflicting claims to the property must be adjudicated, or when the summary remedies are not available because the claim is not yet due or for procedural limitations, are creditor's bills necessary or advantageous. Only one case was noticed, for example, where a creditor's bill was found necessary to reach corporate stock, which is one of the types of property mentioned in the statute. In that case, the creditor's bill was used to enforce the lien obtained by a pro-

⁷³ 77 Ohio App. 87, 65 N. E. 2d 889 (1945).

⁷⁴ 62 Ohio St. 25, 56 N. E. 473 (1900).

⁷⁵ A rare example of the use of a creditor's bill to collect bills and accounts receivable: *Fry v. Smith*, 61 Ohio St. 276, 55 N. E. 826 (1899).

ceedings in aid after conflicting claims to the stock were made.⁷⁶ An assignment by the holder of the stock certificate raised issues which could only be litigated in an equitable proceedings in which all interested parties could be joined.

Early cases illustrate the possible usefulness of equitable jurisdiction, to carry through more elaborate collection processes, in the form of creditors' bills to reach unpaid stock subscriptions of the debtor corporation.⁷⁷ In *Warner v. Callender* the court found equitable jurisdiction particularly appropriate to enable the creditor to reach unpaid stock subscriptions first, and then if necessary, stockholders' liabilities, since the latter assets could be called on only if others were insufficient.⁷⁸

To reach money paid on insurance premiums in fraud of creditors, the creditor's bill will be highly advantageous if not indispensable, and on occasion the recovery may be substantial. *Weenink v. Bland*⁷⁹ well illustrates the problems and possibilities of such a claim under modern conditions. Since the beneficiary, widow, had elected to receive payments in monthly installments under a "spendthrift clause," both the insurance company and the beneficiary were necessary parties. If the beneficiary should elect to take payment in a lump sum, and receive payment, equity may often be needed to impose a trust or equitable lien on tracing principles. If the creditor acts before payment on the policy, both insurer and beneficiary would be necessary parties.

A creditor's bill was used to reach interests denominated equitable interests in choses of action, transferred by the debtor financial institution to another institution as collateral for a loan. The answer of the pledgee admitted possession or control of the choses in action, listing many items which were chiefly debts owed the judgment debtor. The court held the admissions in this answer entitled plaintiffs to a disclosure and accounting of the state of accounts with the judgment debtor, and a decree subjecting any equity that might exist in favor of the judgment debtor after payment of the secured debt.⁸⁰

An important area for finding assets which may be reached by a creditor's bill lies in the tort field, *i.e.* the debtor's claims for injuries to person or property and, presumably, to less tangible interests. While the number of such cases in Ohio is not large, the variety is suggestive of the possibilities. In an early case⁸¹ the creditor recovered a judgment against a man who was soon thereafter alleged in the creditor's bill to be

⁷⁶ *Ball v. Towle Manufacturing Co.*, 67 Ohio St. 306, 65 N. E. 1015 (1902). Case discussed: *Vanneman, Latent Equities in Ohio*, 5 U. of Cin. L. Rev. 135, 153.

⁷⁷ *Miers v. Zanesville & Maysville Turnpike Co.*, 11 Ohio 273 (1842); *Dunbar v. Harrison*, 18 Ohio St. 24 (1868).

⁷⁸ 20 Ohio St. 190 (1870).

⁷⁹ 73 Ohio App. 67, 40 Ohio L. Abs. 57, 54 N. E. 2d 426 (1943). See: *Lytle v. Baldinger*, 84 Ohio St. 1, 95 N. E. 389 (1911).

⁸⁰ *Fishel v. Miller*, 41 Ohio L. Abs. 113, 56 N. E. 2d 955 (App. 1944).

⁸¹ *Denning v. Nelson*, 10 W. L. J. 215, 1 Ohio Dec. Repr. 503 (Dist. Ct. 1852).

insolvent. Some time before the entry of the judgment, the defendant had loaned his son a horse and buggy which the son subsequently sold for a fair sum. The father and son were made parties to the creditor's bill, and plaintiff was found entitled to subject the father's claim for the conversion of the horse and buggy by the son-bailee. By some slight of hand, the court proceeded to liquidate this unliquidated tort claim, by finding the damages due for the conversion, \$125, and entered a decree for the judgment creditor against the son for the somewhat lesser amount due the creditor, and costs of suit! While the wind-up of the suit may have been overly brief, the court considered carefully the question of using a creditor's bill to reach tort choses in action, quoting from 1 *Chitty's General Practice* 99, a definition of choses as including rights to recover a debt, or money or damages for breach of contract, and for a tort connected with contract, and citing *Hudson v. Plets*, 11 Paige C. R. 180 as including within the reach of creditor's bills, a right of action for injury to property.⁸²

In *Cincinnati v. Hafer*,⁸³ the supreme court considered the question of reaching by bill an unliquidated tort (nuisance) claim for injury to real property. The judgment creditor started his action in the nature of a creditor's bill while the debtor had pending a suit against the city for damages to her property. After delay, partly due to a courthouse fire which destroyed records, the debtor recovered judgment for a greater amount than her creditor's claim, which the city soon paid to the debtor. Learning of debtor's judgment against the city, the creditor filed a copy of his original petition against the city, and got judgment against the city for the amount of his judgment. Affirming the lower courts, the court held the unliquidated tort claim came within the words of the statute, "claim, or chose in action, due or to become due to him . . ." The court declared that "chose in action" has a much broader significance than merely "a right of action for money arising under contract," and includes "the right to recover pecuniary damages for a wrong inflicted either upon the person or property."⁸⁴ The court quoted a note by Judge Sharswood in Blackstone's *Commentaries*, and from Kent, to the effect that injuries to the person are choses in action. The opinion then discusses the question of which choses under Ohio statutes survive, mentioning only those for "injuries to real or personal estate . . ." which were thus assignable in equity, and states that mere personal torts die with the party and are not assignable. The Court thus accepted survival and assignability as proper tests as to what may be subjected to the payment of debts.⁸⁵

In *Kittinger Witt Co. v. Brookins*⁸⁶ the creditor attempted to reach both chattels and a claim for personal injuries and the decree dis-

⁸² *Id.*, 10 W. L. J. 218; 1 Ohio Dec. Repr., 505-506 (1852).

⁸³ 49 Ohio St. 60, 30 N. E. 197 (1892).

⁸⁴ *Id.*, 64-65.

⁸⁵ *Id.*, 66-67.

⁸⁶ 35 Ohio App. 266, 172 N. E. 297 (1929).

posed of the proceeds of both, but unfortunately to another lienholder, an assignee, an attorney and the receiver, so there was no urgent reason for arguing the question of the right of a judgment creditor to reach a personal injury claim. In *Strouss-Hirschberg Co. v. Davidson*⁸⁷ the court dealt with the question of subjecting a personal injury claim, and reversed the lower court on the point. It quoted from *Cincinnati v. Hafer*, supra, at some length through the definition of the chose in action as including claims for wrong either upon the person or property, and stopped without further argument.

In view of the present statute on survival, which includes "... injuries to the person or property . . .,"⁸⁸ and the assignability of claims for personal injuries, the tests used in the *Hafer* case are satisfied, and it would appear entirely correct to consider that claims for personal injuries can be reached by a creditor's bill, and likewise, any other claim that would survive or is assignable. The general feeling of the court has been that whatever the debtor "owns," whatever he can control and subject to such purposes as he may choose, should be subject to the claims of judgment creditors.⁸⁹

One of the possible sources of assets of debtors is their rights as heirs or legatees of a deceased person, and the period for reaching these assets with greatest certainty is during the period of administration of the estate of the decedent. Since an attachment or proceedings in aid cannot be used against the administrator or executor,⁹⁰ or, at least, only during the interval between an order of distribution and payment to the beneficiary,⁹¹ the need for a creditor's bill is real.

In a case as early as 1895,⁹² where the chief controversy was as to whether the debtor-beneficiary under the will had an interest in real estate that could be subjected to payment of a judgment (the court thought it too uncertain to be salable), the use of a creditor's bill seems to have been unquestioned and the court intimated that a decree could be framed to subject such distributive share as the debtor might be entitled to on settlement of the estate, under an elaborate scheme of withholding that amount, using the income to apply on the judgment, and on his death if it appeared the debtor's estate or interest was not divested, then so much of the property as would be needed should be applied to the satisfaction of the judgment.

⁸⁷ 19 Ohio L. Abs. 225 (1935); accord *Alms & Doepke Co. v. Johnson* 66 Ohio L. Abs. 580, 115 N. E. 2d, 190, 51 Ohio Op. 375 (C. P. 1953).

⁸⁸ OHIO REV. CODE §2305.21 (11235).

⁸⁹ *Hobbs v. Smith*, 15 Ohio St. 419 (1864); *Merchants' National Bank v. Rieck*, 4 Ohio N. P. 219, 6 Ohio Dec. N. P. 331 (C. P. 1897).

⁹⁰ *Orlopp v. Schueller*, 72 Ohio St. 41, 73 N. E. 1012 (1905).

⁹¹ See *National Radiator Co. v. Hobday*, 17 Ohio Cir. Ct. (N. S.), 489, 42 Ohio Cir. Ct. 244 (1911).

⁹² *Moore v. Herancourt*, 10 Ohio Cir. Ct. 420, 6 Ohio Cir. Dec. 826 (Cir. Ct., 1895).

In 1899,⁹³ the use of a creditor's bill in a superior court was attacked on demurrer on the ground of interference with the exclusive jurisdiction of the probate court. The court concluded that if the estate was still in process of settlement, ". . . this court, without interfering with the exclusive jurisdiction of that court, can so mould its decrees as to preserve the rights and equities of all parties hereto."⁹⁴ The following year in the supreme court,⁹⁵ the same question of jurisdiction in common pleas to entertain a creditor's bill seeking to reach both a legacy and a debt due from the estate to the legatee, was carefully considered. The court concluded that amendments to the statutes and numerous cases had settled the question that the jurisdiction of the probate court ended with the entering of a general order of distribution, with rights of beneficiaries, where there is conflict, to be worked out in other tribunals. The court could see no danger that any proper judgment or order which a court of common pleas might make, would in the least conflict with probate jurisdiction.

In 1937 the same question was reviewed at length as it applied to the case of ancillary administration, the domiciliary administration being in another state.⁹⁶ Authorities in other states were reviewed at some length, as well as the above Ohio decisions, to sustain the use of creditors' bills against the interests of legatees or distributees. As against the contention that the action would interfere with the exercise of the probate court's discretion whether to order distribution by the ancillary administrator or to order the return of net funds to the domiciliary administrator, the court expressed the opinion that this was the sort of case where a creditor's bill could function as a necessary and useful instrument. Otherwise the plaintiff would have to haunt the probate court to watch for an order of distribution or transmittal if there was to be any opportunity to get at the fund, and perhaps take the precaution of suing in New York on the Ohio judgment and thereafter starting a creditor's bill there. The opinion being rendered on demurrer, which was overruled, the court intimated that a temporary injunction staying distribution might be appropriate against the ancillary administrator.

The question of whether the new probate code, effective 1932, with the enlarged equity powers therein conferred, ousted the common pleas court of jurisdiction to entertain a creditor's bill during the administration of an estate and prior to an order of distribution, was presented squarely to the supreme court and answered in the negative.⁹⁷ The Court em-

⁹³ *Boswell v. Hall*, 6 Ohio N. P. 497, 8 Ohio Dec. N. P. 590 (Super. Ct. 1899).

⁹⁴ *Id.*, 498.

⁹⁵ *First National Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485 (1900). Also considered in *Vandenbark v. Mattingly*, 62 Ohio St. 25, 56 N. E. 473 (1900).

⁹⁶ *Knight v. Burdsal*, 24 Ohio L. Abs. 28, 8 Ohio Op. 363 (C. P. 1937).

⁹⁷ *Union Properties, Inc. v. Patterson*, 143 Ohio St. 192, 54 N. E. 2d, 668 (1944).

phasized the fact that delay even until after order for distribution would render the equitable remedy futile in many instances. It was declared that chancery courts must retain their vitality by making relief in equity effective, and that the decree could be formulated to call for payment only when properly due, to limit the possibility of conflict in jurisdiction.⁹⁸

Trusts

Reaching purely equitable interests in property, whether real, chattels, or intangibles, is an obvious area for the use of the creditor's bill. Aside from the examples already discussed, the remaining equitable interest cases are those involving trusts. The chief question discussed in the cases has been as to what interest the beneficiary had. In an early creditor's bill case, the Court found a clear right in the beneficiary to the net income, and not less than \$300 a year, and affirmed a judgment to subject that interest to the claim of creditors.⁹⁹ Much earlier, a creditor's bill had been sustained to reach the corpus, trust purposes having been accomplished.¹⁰⁰

The question of the effect of OHIO REV. CODE §2333.01 (11760) upon the interest of the beneficiary under a spendthrift trust, was thoroughly considered in *Brooks v. Raynolds*,¹⁰¹ in decisions in federal courts which have been frequently referred to in the Ohio cases. Judge Lurton's opinion made it clear that the civil procedure provision should not be considered as relating to or dealing with the substantive laws of property.¹⁰² The court having found that the beneficiary had no vested right to any portion of the income or surplus of income, since it was payable only at the discretion of the trustee, guided only by his judgment as to needs and benefits, and since it was within the discretion of the trustee to provide for the debtor beneficiary as a member of that person's family (the other beneficiaries of the estate), there was no interest which creditors of the beneficiary could subject to the payment of judgments.¹⁰³ The other Ohio cases have usually followed similar principles.¹⁰⁴

Property in Custodia Legis

Both in Ohio and in other jurisdictions, a creditor's bill is frequently

⁹⁸ *Id.*, 198-199, 54 N. E. 2d 672.

⁹⁹ *Thornton v. Stanley*, 55 Ohio St. 199, 45 N. E. 318 (1896); *Wallace v. Smith*, 12 Ohio Dec. Repr. 339, 2 Hand. 78 (Super. Ct. 1855).

¹⁰⁰ *Dunbar v. Harrison*, 18 Ohio St. 24 (1868).

¹⁰¹ First opinion, *sub nom.* *Raynolds v. Hanna*, 7 Ohio F. D. 448, 55 Fed. 783 (Cir. Ct., N. D. C., 1893).

¹⁰² 9 Ohio F. D. 160, 8 C. C. A. 370, 59 Fed. 938 (6th Cir. 1894).

¹⁰³ 8 Ohio F. D. 78, 8 C. C. A. 370, 59 Fed. 923 (6th Cir. 1893).

¹⁰⁴ *Morris v. Daiker*, 35 Ohio App. 394, 172 N. E. 540 (1929); *Boswell v. Hall*, 6 Ohio N. P. 497, 8 Ohio Dec. N. P. 590 (Super. Ct. 1899); *Merchants' National Bank v. Rieck*, 4 Ohio N. P. 219, 6 Ohio Dec. N. P. 331 (C. P. 1897); *Brinker v. Speer*, 8 Ohio Dec. Repr. 755 (Dist. Ct. 1883?); *Wallace v. Smith*, 12 Ohio Dec. Repr. 339, 2 Hand. 78 (Super. Ct. 1855). *But see* *Frazier v. Wilkinson*, 10 Ohio Cir. Dec. 106, 18 Ohio Cir. Ct. 363 (1899), *Skillman v. Symmes*, 7 Ohio Cir. Dec. 39, 14 Ohio Cir. Ct. 547 (1896).

met with the objection that the property sought to be reached is in *custodia legis* and therefore untouchable. Apparently the phrase is more commonly used in attachment and proceedings in aid cases, and may well there find very proper use to prevent the rough and ready processes of summary proceedings from disrupting the prior proceedings in which the property has been brought within the control of a court. Another seizure of the property by attachment, or an attempt to complicate the life of a court clerk by making him liable to two distinct and uncoordinated sets of orders, is unthinkable. But in the creditors bill cases, entirely different methods of and levels of proceeding obtain. No useful definitions of this concept were found or at least understood by the writer, so the question is raised as to whether the objection of *in custodia legis* has any literal and useful significance in this area.

Evidence of the confusion as to the meaning of the phrase may be found in its use in objections to bills reaching for the interests of legatees or distributees.¹⁰⁵ The answer of the Ohio courts in these cases, seems to give a good lead for the analysis of the objection. That answer has been that the creditor's bill can be maintained because the decree therein need not and will not interfere with "the jurisdiction," *i.e.*, the course of proceedings, in the probate court.¹⁰⁶

The Supreme Judicial Court of Massachusetts in *Adamian v. Hassano*¹⁰⁷ spelled out apparently the same general idea when it seemed necessary to place some limits on this restriction on the usefulness of creditors' bills. It noted, as is true in Ohio also, that the statute of Massachusetts contained very broad and inclusive terms as to the property which may be reached by this equitable process. It assumed that property held by clerk of the court, could not be reached by *attachment* because *in custodia legis*. "But the rule that property *in custodia legis* cannot be reached by a creditor is not a rule *strictissimi juris*, but is founded on convenience, and is subject to exceptions." The Court noted that personal property held by an officer under attachment was within the rule, so as not to be subject to levy or attachment by another officer, but that the same officer can make any number of successive attachments upon it for different plaintiffs.

The Massachusetts Court indicated that the grounds supporting the application of the limitation in other cases were founded on principles such as that a court cannot interfere with property which is in the control of another court.¹⁰⁸ Since the property in the instant case was held by the court under trustee process (called by the Court "equitable attachment"), it was proper for another creditor to come into the same court to assert

¹⁰⁵ *Supra*, n. 96.

¹⁰⁶ *Supra*, n. 97.

¹⁰⁷ 189 Mass. 194, 75 N. E. 126 (1905).

¹⁰⁸ Nor with the processes thereof: May not reach fees not yet allowed of an administrator or receiver: *Overturf v. Overturf*, 62 Ohio St. 127, 56 N. E. 653 (1900); *Hamberger v. Darusmont*, 3 Ohio N. P. 222 (Super. 1896).

his claim by creditor's bill, a situation analogous to successive attachments by the same attaching officer. The new claim would not hinder or delay the determination of the earlier proceedings, and the law would provide an answer as to priority of claims. The court of equity should undertake to hold the debtor's property for the satisfaction of all claims against him, unless there was good reason for declining to do so.

The Massachusetts Court distinguished the case of *Commonwealth v. Hide & Leather Insurance Co.*,¹⁰⁹ on the ground stated therein for refusing to sustain a creditor's bill, that where a court is administering a fund for distribution among creditors of an insolvent, it would be too great an embarrassment of the regular proceedings to permit a creditor of one of these creditors to come into court and litigate his claim against the creditor who is primarily entitled to share in the fund.

The basic proposition of the *Adamian* case, that equity should hold the assets for the satisfaction of the claims of all creditors who ask for such aid, unless good cause is found for not doing so, seems entirely sound and in keeping with declared purpose of the statute that such property should be subject to the claims of creditors. The analysis of the Court of the *Adamian* case, however, proceeded no further than was necessary, and the ground for declining aid in the *Hide & Leather* case seems highly artificial, well in line with Ohio debtors' objections in decedents' cases. The Ohio decisions, and those in some other jurisdictions, have indicated that the common pleas decree need not interfere with probate proceedings. It would not seem more difficult than in decedent cases, for the same or another common pleas court in separate suits to frame decrees which might reach funds when distributed by a court having jurisdiction of a receivership to liquidate an insurance company, as in the *Hide & Leather* case, or a proceedings to condemn land as in an Ohio case.¹¹⁰ As in the cases to reach interests in estates of decedents, the creditor's bill will be a separate suit and will not complicate the issues nor delay the termination of the receivership or condemnation proceedings.

In many cases, if jurisdiction of the property is desirable, the method of acquiring it can be simple. In *Scott County Nat. Bank v. Robinson*,¹¹¹ the Supreme Court of Tennessee dealt with the problem of a creditor's bill to reach a claim of the debtor as one of the creditors in a general creditors' suit against an insolvent corporation. A receiver for the corporation had been appointed, a sale of corporate properties had been had, and the proceeds of the sale in the form of three notes payable to the clerk of the court were in the hands of the clerk. The creditor's bill here involved was begun by attachment against a non-resident who was alleged to be insolvent but who had property, *i.e.*, the creditor's claim

¹⁰⁹ 119 Mass. 155 (1875).

¹¹⁰ *Pierce v. Fortner*, 64 Ohio App. 544, 29 N. E. 2d 165 (1940).

¹¹¹ 143 Tenn. 356, 226 S. W. 218 (1920).

against the corporation. The sheriff undertook to levy an attachment on the notes in possession of the clerk. Another creditor filed a similar bill, adding as a party the clerk of the court, and a similar "levy of attachment" was made. The Supreme Court of Tennessee held the public official not subject to garnishment as to funds held in his official capacity and also that it was improper to make him a party. Nevertheless, all that was necessary had been done to give the creditor his lien.

The party to whom the fund is going, being brought into court to prevent its payment to him and to obtain its application to the obligation which he owes to the complainant, serves every purpose of the court for the protection of the rights of the parties.¹¹²

Quoting from an earlier case of similar cast, ". . . this was the proper mode in a case of this character to impound the fund."

In early Ohio cases, the courts reached the same result without argument.^{112a} The Tennessee court also quoted from 12 Cyc. 61, and declared applicable, the proposition that when a creditor in his bill describes the property sought to be reached, that ". . . to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary."¹¹³

So far as it appears in the *Scott County* opinion, the case was founded on jurisdiction of property of a non-resident, not on personal service and *in personam* jurisdiction, which leaves in doubt how the property was first seized to serve as a basis for acquiring jurisdiction by substituted service. However the conflicts question be resolved, the Court's reasoning seems entirely applicable to the case of a debtor who has been personally served, and answers the question of what more would be needed to enable the Court to deal with the property. The answer was clearly given: nothing more. Thereby the boggy of interfering with funds *in custodia legis*, with visions of serving summons on an officer of the court, attaching property in his hands and other such indicia of direct conflicts of jurisdiction, as well as the fear that the insolvency receivership would be complicated and delayed with additional issues and parties, was eliminated.

What of the situation where the funds are in the custody of another court? Must the court of equity decline to entertain a suit when it cannot by officer lay hands on the property? It is true that awkward questions can arise where the court cannot control all equities that may be asserted against the property and insure obedience by *in rem* remedies. It seems a far cry from the day when the Chancellor insisted that all his acts were *in personam*, and that he did no more than bind the conscience of the defendant, to see courts so accustomed to equity acting *in rem*,

¹¹² *Id.*, 143 Tenn. 356, 226 S. W. 218, 220 (1920).

^{112a} *Myers v. Hewitt*, *supra*, n. 42; *Moore v. Rittenhouse*, *supra*, n. 44.

¹¹³ *Scott County Nat. Bank v. Robinson*, 143 Tenn. 356, 226 S. W. 218, 221 (1920).

that it is deemed an improper thing to take jurisdiction if all that can be done is to order the defendant to deliver whatever he may receive from another court to the custody of the instant court. Perhaps the creditor in *Culp v. Hecht*¹¹⁴ wanted more, since he made the clerk of the other court a defendant, but sustaining a demurrer for want of jurisdiction of the subject of the action and for want of a cause of action seems questionable if the judgment debtor was personally served. Perhaps on some theory the fact appearing in the petition, that plaintiff had pending in the other court a proceedings in aid would have furnished an answer in abatement, and allegations that the clerk will have or does have funds due the debtor on a judgment recovered in the other court, might show no cause of action against the clerk, but the grounds of demurrer do not seem well taken. The presence of another, unidentified defendant, suggests that plaintiff may have needed equitable interposition, and that with the other claimant in court, a satisfactory disposition may have been quite possible.

The case of *State, ex. rel. Spires v. Allread*¹¹⁵ has been cited in relation to creditors' bills, but, read in connection with *Hirsch v. Conn.*¹¹⁶ appears to involve an entirely different situation, of a creditor trying to reach assets of a corporation while *quo warranto* proceedings looking to dissolution and distribution of assets were pending. The impropriety of allowing a single creditor to seize assets while a general liquidation was proceeding involves an entirely different concept, and does not involve assets as to which effective liens may be obtained.

On general principles, the proper conclusion seems to be that the objection of the property being *in custodia legis* has no sound standing in simple creditor's bill cases. While much utility in such a principle exists in connection with common law writs, to avoid casting the administrative officers of the courts into perilous perplexities, the ease with which the judge through his decree can adjust conflicting claims and avoid head-on collisions of jurisdiction eliminates the bogies which have been seen, except in such general liquidation proceedings as were just referred to.

PLEADING, DEFENSES AND PROCEDURAL INCIDENTS

Since the creditor's bill is an equity proceeding and is, under the code, an action, most of the procedural problems are governed by the rules common to suits of equity as they are carried on under the code. There are a number of problems which relate, however, to the specific characteristics of the creditor's bill, and some discussion of them seems needful.

Venue and Jurisdiction

Jurisdiction to entertain a creditor's bill requires that the court shall have jurisdiction of equitable causes, and it has been common to

¹¹⁴ 43 Ohio App. 430, 183 N. E. 437 (1932).

¹¹⁵ 117 Ohio St. 584, 160 N. E. 26 (1927).

¹¹⁶ 115 Ohio St. 87, 152 N. E. 185 (1926).

consider the common pleas courts in Ohio as the tribunals to which to resort.¹¹⁷ The more recently conferred equitable jurisdiction of the municipal courts,¹¹⁸ and failure to take advantage of it after bringing a proceedings in aid in such court, raised fatal theoretical problems in one case.¹¹⁹ Besides simplifying the process of making the decree effective, the municipal courts may offer various practical advantages, including speed of disposition.

The problems of venue have been dealt with rarely in Ohio, but there is a useful discussion in the opinion on *Butler v. Birkey*,¹²⁰ a creditors' suit to reach assets, including Ohio real property situated in two counties outside the county in which suit was begun. Apparently the suit was begun in a county where one or more of the defendants resided, and the court refused to dismiss the petition on venue grounds. The court noted¹²¹ the substantial sameness of the creditor's bill provision of the code and that of the Chancery Act of 1831 which in section 16 had provided that application might be made "to the courts of chancery in the country where such judgment was rendered, or where said lands lie, to subject any or all of the hereinbefore enumerated interests to the payment of the judgment or decree aforesaid, according to the usual course of proceeding, and known usage of courts of chancery . . .," whereas section 458 of the code was silent as to the county in which the action might be brought. The court found that creditors' bills did not come within the causes enumerated in §45 of the code, for the recovery of real estate, partition of real property, and sale of real property under a mortgage lien or other encumbrances, all of which were always regarded as local. The liens dealt with in the third item of that section, were liens existing independently of action.¹²² The court concluded therefore that the venue of creditors' bills was specified in section 53 of the code which provided that: "Every other action must be brought in the county in which the defendant, or some one of the defendants resides, or may be summoned."

The court pointed out that the old chancery act permitted all interests and equities and credits of the judgment debtor within the state, to be subjected by one suit, and that it was in keeping with code aims to avoid any construction which would require suits in each of the counties in which the debtor had lands.¹²³

The venue question was raised in an action brought in Erie County

¹¹⁷ *Vandenbark v. Mattingly*, 62 Ohio St. 25, 56 N. E. 473 (1900).

¹¹⁸ OHIO REV. CODE §§1901.18 (E) (1594), 1901.19 (G) (1595) deal with jurisdiction, the latter by name. OHIO REV. CODE §1901.23 (1603) provides adequately for writs and process.

¹¹⁹ *Culp v. Hecht*, 43 Ohio App. 430, 183 N. E. 437 (1932).

¹²⁰ 13 Ohio St. 514 (1862).

¹²¹ *Id.*, 520.

¹²² *Id.*, 518-519.

¹²³ *Id.*, 520

to subject certain real property and personal property located in that county and certain equitable interests in real property in Ottawa County, the latter also being the residence of the debtor and the place of service of summons on him.¹²⁴ Numerous other persons were made defendants, including some resident in Erie County. A motion to discharge the receiver appointed in the action was made on the grounds of lack of jurisdiction of the person of the debtor, because part of the real estate was in another county, and because the receiver was appointed before a summons was issued. The court did not find the venue questionable enough for discussion, though it did doubt that the court could exercise jurisdiction over lands situated outside the county of venue, but held the appointment of a receiver before service of summons was error.

While venue of the action is affected by the particular statute of a jurisdiction, and on the whole, few decided cases appear to have been reported on the question, the general tenor of those cases coincides well with the approach in *Butler v. Birkey*, supra.¹²⁵ The generally useful opinion in *Bay State Iron Co. v. Goodall*,¹²⁶ written only three years before that in *Butler*, placed more reliance on the earlier cases and little on an 1845 statute similar to that of Ohio, and reached the same conclusion as to proper venue, i.e., that proper for personal actions generally.

The guiding principles in the selection of venue, statutory rules aside, would seem to be that since the creditor's bill can be based solely upon jurisdiction *in personam* and in many cases a decree in that form can be so devised as to meet the creditor's needs, the county or jurisdiction where the debtor or one of the persons sought to be reached by the bill, resides, will be an eligible choice; that where assets to be reached are widely scattered and in numerous jurisdictions, only one original action should be needed and hence one county or jurisdiction will have to be chosen; that where several counties or jurisdictions can be chosen, it will be desirable in many instances to choose the one in which it is most desirable to have equitable remedies operate *in rem*, whether by intervention in other proceedings or by record or process against real property. The appointment of a receiver to collect assets and bring other suits should solve some difficult problems as to jurisdiction of real property. No doubt, experience with our intricate procedural devices will suggest other possibilities.

Parties and Joinder

A sound feeling for equitable principles would seem to be about all that is needed for guidance as to parties, although a quick review of the

¹²⁴ *Dwelle v. Hinde*, 18 Ohio Cir. Ct. 618, 8 Ohio Cir. Dec. 177 (1897). But see, as to power to deal with real property in another county, *Clayton v. Henley*, *infra*, n. 125.

¹²⁵ *Clayton v. Henley*, 32 Gratt. (73 Va.) 65 (1879); *Bryant v. Thomas*, 143 Ga. 217, 84 S. E. 739 (1915); *Branblett v. Couch*, 32 Ky. L. 311, 105 S. W. 460 (1907).

¹²⁶ 39 N. H. 223 (1859).

sections on the subject in the encyclopedias and special treatises may suggest some of the great flexibility possible. The terms of the code and as to both plaintiffs and defendants, any person who has "an interest in the subject of the action," and "in the relief demanded," and "an interest in the controversy," or who is necessary "to a complete determination or settlement of a question involved therein,"¹²⁷ are phrases of the greatest latitude in equity cases.

Obviously, the debtor or his representative will be a necessary party since his rights are "the subject of the action" and he will obviously have an interest adverse to that of the plaintiff.¹²⁸ If he is a non-resident, process to seize in one form or another his property, sufficient to satisfy conflict of laws principles, will be a necessary part of the beginning of the suit.¹²⁹ Joinder of numerous individual creditors as plaintiffs,¹³⁰ as well as joining as many as needed or all of those holding in any sense assets of the debtor, as defendants,¹³¹ has been approved. Among those made defendants as holders of the debtor's assets may be "bodies politic," including subdivisions of the state as well as the state itself.¹³² Joinder of other creditors as defendants, when they hold any lien or other interests in the property sought to be reached, will often be necessary and frequently will be useful for adequate or complete relief.¹³³

In view of the infinite variety of situations which can be met, and the many turns and quirks that remedies may develop, even a beginning on a detailed study seems at least inadvisable.

Pleadings

Among the questions raised in the Ohio cases, that of alleging a judgment for money, is an obvious one. The statute speaks in terms of a "judgment creditor," and while some exceptional cases have arisen where equity has used its process to satisfy debt obligations without the creditor having obtained a judgment,¹³⁴ few if any will hereafter arise which will escape the requirement. The early requirement, based upon due respect for the jurisdiction of law courts, was for a judgment upon

¹²⁷ OHIO REV. CODE §§2307.18 (11254), 2307.19 (11255).

¹²⁸ *Devou v. Devou*, 65 Ohio App. 508, 31 N. E. 2d 159, *appeal dis.* 136 Ohio St. 339, 25 N. E. 2d 681 (1941).

¹²⁹ See *ibid.*, where service on the trustee of funds sought to be reached is apparently assumed to suffice, if substituted service of summons on the judgment debtor follows. BEALE, *CONFLICT OF LAWS*, 449 ff., 451 n. 8, 452 n. 4, 455-466.

¹³⁰ *Wittenberg College v. Houston*, Dayton [Id.] T. R. 53 (Ohio C. P. 1899).

¹³¹ *Seymour v. Browning*, 17 Ohio 362 (1848), but if to an excessive amount, selection may be required: *Gilmore v. Miami Bank*, 3 Ohio 502 (1828).

¹³² *Urich v. Kolesar*, 132 Ohio St. 115, 5 N.E. 2d 335, (1936), *Selmar v. Industrial Comm.*, 24 Ohio Abs. 210, 8 Ohio Op. 522 (Munic. Ct. 1937).

¹³³ *Conway v. Gooden*, 61 Ohio App. 316, 15 Ohio L. Abs. 397 (Ct. App. 1933); *Krebs v. Forbriger*, 10 Ohio Dec. Rep. 506, 21 Bull. 313 (Super. Ct., 1889).

¹³⁴ See 11 O. JUR. CREDITORS' SUITS 987-8.

which execution has been or can be issued.¹³⁵ The pleading should show that the judgment is not dormant¹³⁶ at the beginning of the action,¹³⁷ a fact involved in pleading the judgment unless it has been revived. There appears to be no necessity of negating appeal or reversal, aside from presumptions, since appeal without more does not stay the right to execution, and reversal followed by a second judgment has been held not to have affected the lien secured on starting the creditor's action.¹³⁸

An allegation as to the inadequacy of the remedy is necessary,¹³⁹ and it has been held properly to follow the effect of the words of the statute, that the debtor "does not have sufficient personal or real property subject to levy on execution to satisfy the judgment," rather than that an execution was issued and returned no property,¹⁴⁰ since the ultimate facts and not evidence should be pleaded. It seems possible that an argument could be constructed that the requirement of inadequacy of remedy at law should no longer obtain,¹⁴¹ in spite of the words of the statute, since no policy is evidenced by our statutes to prefer property which can only be reached under this section, by withholding it from process to pay debts until other classes are exhausted;¹⁴² that the courts have treated the distinction as a procedural accident;¹⁴³ and where the same classes of property can be reached by proceedings in aid, the debtor cannot defeat the lien by showing other property subject to execution.¹⁴⁴ Apparently the point will be rarely raised and may be of slight practical importance.

One element of pleading which seems not to have had discussion in Ohio cases, is the necessity of describing the property of the debtor which is sought to be subjected. Scattered references to the problem are

¹³⁵ *E.g.*, *Brush v. Kinslay*, 14 Ohio 20, 22 (1846); *Helger v. Grove*, 63 Ohio St. 404, 427 (1900); foreign judgment therefore insufficient: *Devou v. Devou*, 65 Ohio App. 508, 31 N. E. 2d, 159 (1941).

¹³⁶ *Helger v. Grove*, *supra*, n. 135. Dormancy of judgments apparently made ground of decision on rehearing. *Cf.*, *Helger v. Grove*, 63 Ohio St. 567, (1900).

¹³⁷ That judgment becomes dormant during pendency of the action does not affect plaintiff's rights: *Dempsey v. Bush*, 18 Ohio St. 376 (1868); *Cincinnati v. Hager*, 49 Ohio St. 60, 30 N. E. 197 (1892).

¹³⁸ *Gibbon v. Dougherty*, 10 Ohio St. 365 (1859); *Stoddard v. Myers*, 8 Ohio 203 (1837).

¹³⁹ *E.g.*, *Forest City Material Co. v. First Nat. Bank*, 96 Ohio App. 89, 54 Ohio Op. 189 (1954).

¹⁴⁰ *Bomberger v. Turner*, 13 Ohio St. 263 (1862); *Forest City Material Co. v. First Nat. Bank*, 96 Ohio App. 89, 54 Ohio Op. 189 (1954); *McElfresh v. McElfresh*, 8 Ohio L. Abs. 254 (App. 1929).

¹⁴¹ Required to be proved: *Lee v. Harback*, 2 Ohio Dec. Repr. 361, (Com. Pl. 1860); *see: Bomberger v. Turner*, *supra* n. 140, at 270.

¹⁴² See scattering of authority, 21 C. J. S. CREDITORS' SUITS 1078, n. 35, 15 C. J. S. CREDITORS' SUITS 1388, n. 54. *Contra: McElfresh v. McElfresh*, 8 Ohio L. Abs. 254 (App. 1929).

¹⁴³ *Stern v. Columbus Mutual Life Ins. Co.* 39 Ohio App. 498, 177 N. E. 923 (1931); *cf. Gormley v. Potter*, 29 Ohio St. 597 (1876).

¹⁴⁴ *Stern v. Columbus Mutual Life Ins. Co.*, *supra*, n. 143.

found in other jurisdictions,¹⁴⁵ but the more informative discussions seem to appear in the earlier cases. Justice Swayne speaking for the United States Supreme Court in *Miller v. Sherry*,¹⁴⁶ developed the underlying ideas. The lien obtained by starting such a suit served the same function as the judgment lien on property subject to levy. A properly drawn bill would raise the lien by creating ". . . a *lis pendens*, operating as notice, as to any such real estate. To have that effect, a bill must be so definite in the description, that any one reading it can learn thereby what property is intended to be made the subject of litigation."¹⁴⁷ The Supreme Court pointed out that in addition to warning intending purchasers in that fashion, it was essential that the holder of the legal title be made a party to the suit to affect a party as a purchaser *pendente lite*.

The Supreme Court in that case, as have other courts when discovery was an important item of equitable relief,¹⁴⁸ approved the filing of a creditor's bill which did not describe any specific property but which would provide the means for discovery, and in addition "be effectual for the purpose of creating a general lien upon the assets of" the debtor, to serve as the foundation for an injunction, and for an order that he should convey to a receiver. But if discovery pointed out assets and "if it became necessary to litigate as to any specific claim . . . , an amendment to the bill would have been indispensable." *Lis pendens* would operate from the time of the amended bill, *i.e.*, the creditor's lien on the described property would date from that time.¹⁴⁹ These principles appear to afford sufficient leeway for a creditor to proceed promptly, and yet provide a sound base for the lien system.

Interpleader and Intervention

From the point of view of the debtor's debtor who is made defendant, or other holders of property sought to be reached by the creditor, the use of the interpleader, whether under the code provision or under old equity practice, is frequently of prime importance for protection against claims of third parties. The careful discussion of Judge Spears in *First National Bank v. Beebe*¹⁵⁰ provide a sound basis for the broad use of this device in a creditor's bill action.

Under the similar principles adopted in Ohio as to intervention, any person whose interests may be affected by a judgment in a creditor's

¹⁴⁵ See cases cited 21 C. J. S., CREDITORS' SUITS 1115, n. 61, 63; 15 C. J., CREDITORS' SUITS 1423-1424, ns. 57-59.

¹⁴⁶ 2 Wall. 237 (U. S. 1864).

¹⁴⁷ *Id.*, 250 *Accord*, as to significance of *lis pendens*, *Stoddard's Lessee v. Myers*, 8 Ohio 203 (1837).

¹⁴⁸ *Miers v. Zanesville & Maysville Turnpike Co.*, 11 Ohio 273 (1842); *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 231-232 (1859).

¹⁴⁹ *Miller v. Sherry*, *supra* n. 146, 250-251; *Stoddard's Lessee v. Myers*, 8 Ohio 203 (1837).

¹⁵⁰ 62 Ohio St. 41, 43-44, 56 N. E. 485, 486 (1900).

action, or who has a lien upon or other claim to property sought to be subjected, can intervene in the action to protect his interests.¹⁵¹

REMEDIES AND DECREES

Because of the great variety of situations to be met, anything like a complete description of the remedies available, intermediate or final, seems impossible.¹⁵² Apparently any device and remedy can be made available which can be sustained by the principles of equitable jurisdiction. If there is adequate jurisdiction of the persons and the property, the remedies may be either *in personam* or *in rem*, or both, and the form can be almost infinitely varied.

A common preliminary step shortly after commencement of the suit, is the issuance of an injunction against the debtor or those holding his assets, from disposing of them or encumbering except on order of the Court.¹⁵³ While the creditor's lien does not depend on the issuance of an injunction,¹⁵⁴ the stay may avoid other issues arising. A disclosure as to relationships with the debtor and their affairs, and an accounting, may be ordered against the garnishee.¹⁵⁵ The appointment of a receiver for collecting money due the debtor in such form as rents or installment payments, as well as collecting funds from numerous sources, taking charge of stocks of goods, accounts or other evidences of debt, receiving payments on uncontested claims, taking possession of real property requiring management, and no doubt for other purposes, is apparently a common feature in many cases.¹⁵⁶ Often in simple situations a receiver may be a needless process and expense, since payments can be ordered made to the clerk of court.¹⁵⁷ In addition to interrogatories for the purpose of discovering assets, discovery may be advanced by the designation of a referee or master for examining the debtor as to his affairs and transactions, as well as to take accountings,¹⁵⁸ and marshall liens and assets.¹⁵⁹

The use of a receiver to bring suit on choses belonging to the debtor, or possibly other suits necessary to the effectuation of full relief, seems

¹⁵¹ See discussion and cases cited, 30 O. JUR., PARTIES 792-800. See: Kit Carter Cattle Co. v. M'Gillin, 7 Ohio N. P. 575, 579 (Com. Pl. 1900) revd. on another ground, 11 Ohio Cir. Dec. 413, 21 Ohio Cir. Ct. 210; Akron Building & Loan Ass'n. v. Foltz, 16 Ohio Cir. Ct. (N. S.) 299, 26 Ohio Cir. Dec. 572 (1908).

¹⁵² One of the better sources of current materials is in 21 C. J. S., CREDITORS' SUITS 1128-1143.

¹⁵³ Moore v. Rittenhouse, 15 Ohio St. 310 (1864); 21 C. J. S., CREDITORS' SUITS 1103-4: injunction frequently issued as a matter of course in aid of creditors' suits.

¹⁵⁴ See, *supra*, n. 34 as to when lien attaches in Ohio. *Contra*, Saginaw County Sav. Bank v. Duffield, 157 Mich. 522, 122 N. W. 186 (1909).

¹⁵⁵ Fishel v. Miller, 41 Ohio L. Abs. 113, 56 N. E. 2d 955 (App. 1944).

¹⁵⁶ Kittinger Witt Co. v. Brookins, 35 Ohio App. 266, 30 Ohio L. R. 552, 172 N. E. 297 (1929); Fry v. Smith, 61 Ohio St. 276, 55 N. E. 826 (1899); Moore v. Rittenhouse, 15 Ohio St. 310 (1864); 21 C.J.S., CREDITORS' SUITS 1106-1110.

¹⁵⁷ Conway v. Gooden Bros., 15 Ohio L. Abs. 397, 400 (App. 1933).

¹⁵⁸ 21 C. J. S., CREDITORS' SUITS 1127.

¹⁵⁹ 21 C. J. S., CREDITORS' SUITS 1126-1127.

not to have been discussed in connection with Ohio creditors' action, but has had some attention elsewhere.¹⁶⁰

The final relief is more difficult to classify, beyond the common examples. The simplest is a judgment for money against the party who, owing money to the debtor, has paid it after notice to the debtor.¹⁶¹ A very common remedy is by sale of debtor's property under the creditor's bill lien, free and clear of other liens attached thereto, with a distribution of the proceeds to the lienholders in order of their priorities.¹⁶² Setting aside fraudulent conveyances or encumbrances, and ordering sale of real or personal property, has been common.¹⁶³ Relief through subrogation to liens of others and the enforcement of those liens is not uncommon.¹⁶⁴ Finding a lien on funds in the hands of the Court or other third persons, and ordering payment from the fund, however the liens were obtained, has occurred in Ohio.¹⁶⁵ Ordering payments diverted to the satisfaction of judgments, from personal representatives and trustees, is well established.¹⁶⁶ An important part of the relief will often be the adjudication of priorities of liens, binding on all persons made parties, although not on others, with the distribution of funds as incidental, involving only an order to the clerk or receiver.¹⁶⁷ To complete sales where jurisdiction is *in personam*, the court may order the debtor to execute assignments or conveyances of title,¹⁶⁸ as in the case of patents or land sold outside the county if that should be deemed feasible.

The guiding principles are those of equity generally, that the Court will retain jurisdiction to administer complete relief by settling all questions involved,¹⁶⁹ but will not proceed further in fringe questions to adjudicate the rights of the debtor and third persons when unnecessary to the primary aim of effectuating the rights of the creditor or creditors interested in the action.¹⁷⁰

¹⁶⁰ See: *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197, 199 (1892); 21 C. J. S., CREDITORS' SUITS 1110-1111.

¹⁶¹ *Hafer v. City of Cincinnati*, 49 Ohio St. 60, 30 N. E. 197 (1892); *Gibbon v. Dougherty*, 10 Ohio St. 365 (1859); *Alms & Doepke Co. v. Johnson*, 66 Ohio L. Abs. 580, 51 Ohio Op. 375, 115 N. E. 2d 190 (C. P. 1953); *Citizens Sav. & Trust Co. v. Burkhart*, 26 Ohio Dec. 505, 17 Ohio N. P. (N. S.) 401 (C. P. 1914).

¹⁶² *E.g.*, *Anderson v. Lanterman*, 27 Ohio St. 104, 110 (1875); *Dempsey v. Bush*, 18 Ohio St. 376 (1868).

¹⁶³ *E.g.*, *Hampson v. Sumner*, 18 Ohio 444 (1849).

¹⁶⁴ *Anderson v. Lanterman*, 27 Ohio St. 104 (1875); *Edwards v. Edwards*, 24 Ohio St. 402 (1873); *Dempsey v. Bush*, 18 Ohio 376 (1868).

¹⁶⁵ *Vandenbark v. Mattingly*, 62 Ohio St. 25, 56 N. E. 473 (1900); *Hemminway v. Davis*, 24 Ohio St. 150 (1873); *Myers v. Hewitt*, 16 Ohio 449 (1847).

¹⁶⁶ *First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485 (1900).

¹⁶⁷ *Moore v. Rittenhouse*, 15 Ohio St. 310 (1864); *Hemminway v. Davis*, 24 Ohio St. 150 (1873).

¹⁶⁸ 21 C. J. S., CREDITORS' SUITS 1128, n. 54; 1139, n. 11, 12.

¹⁶⁹ *Bomberger v. Turner*, 13 Ohio St. 263 (1862); *Conway v. Gooden Bros.*, 15 Ohio L. Abs. 397, 400 (App. 1933).

¹⁷⁰ 21 C. J. S., CREDITORS' SUITS 1128, n. 52; 15 C. J., CREDITORS' SUITS 1432, n. 53.